87-1789

APR 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

In The

Supreme Court of the United States

October Term, 1987

BAKER, SMITH & MILLS, P.C.
f/k/a BAKER, MILLER, MILLS & MURRAY, P.C.,
Petitioner,

v.

MINEREX ERDOEL, INC., KARL-HEINZ KRUGER and OTTO HACKOBER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JERRY R. SELINGER
Counsel of Record
DAVID E. HOWE
ALYSON C. DOVER
BAKER, MILLS & GLAST, P.C.
500 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201-2916
(214) 220-8200
Attorneys for Petitioner

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS 75208 — (214) 748-6022

QUESTION PRESENTED

Did the Court of Appeals for the Fifth Circuit err in holding that the United States District Courts are precluded by Section 104(a) of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA),* codified in 28 U.S.C. § 158, from referring appeals from the decisions of the United States Bankruptcy Courts to United States Magistrates with the consent of all parties, where: (1) the very Act purportedly precluding such referrals (the BAFJA) deleted the only statutory provision in existence which expressly prohibited such referrals; and (2) a related statute (28 U.S.C. § 636(c)(1)) authorizes such referrals "notwithstanding any other provision of law to the contrary."?

---

* P. L. 98-353, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S. CODE CONG. AND AD. NEWS (98 Stat.) 333 *et seq.*

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Minerex Erdoel, Inc.

Karl-Heinz Krueger

Otto Hackober

Baker, Smith & Mills, P.C. f/k/a
Baker, Miller, Mills & Murray, P.C.

Sina, Inc.

Sina 77-78, Ltd.

Sina 78-79, Ltd.

Sina 79-80, Ltd.

Sina 80-81, Ltd.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	iii
Table of Authorities	vi
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	5
I. Special and Important Reasons for Review on Writ of Certiorari Exist	5
II. Novel Issues Concerning the Interplay of Two Federal Statutes Exist Which Should be Decided by the Supreme Court	7
CONCLUSION	12

Appendix

Minerex Erdoel, Inc. v. Sina, Inc., 838 F.2d 781 (5th Cir. 1988)	A-1
Order	A-12
Memorandum Opinion and Order	A-13
Consent	A-24
28 U.S.C. §636	A-26
28 U.S.C. §158	A-29
28 U.S.C. §1334 (1978)	A-30
28 U.S.C. §1334 (1984)	A-31

TABLE OF AUTHORITIES

Cases	Page
Donaldson v. United States, 400 U.S. 517, 522 (1971)	5
Kossick v. United Fruit Co., 365 U.S. 731, 733 (1960)	6
Mathews v. Weber, 423 U.S. 261, 266-70 (1976)	6, 9
Matter of Elcona Homes Corp., 810 F.2d 136, 139 (7th Cir. 1987)	5, 8
Minerex Erdoel, Inc. v. Sina, Inc., 838 F.2d 781 (5th Cir. 1988)	1-2, 5
Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982)	8
Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 725 F.2d 537, 546 (9th Cir. 1984)	6-7
Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1018 (1984)	10
Russello v. United States, 464 U.S. 16, 23-24 (1983)	10
United States v. An Article of Drug . . . Bacto-Unidisk . . ., 394 U.S. 784, 791 (1969)	6
United States v. Brown, 333 U.S. 18, 25-26 (1948)	10
United States v. Mendoza, 565 F.2d 1285, 1289 (5th Cir. 1978)	11
United States v. Muniz, 374 U.S. 150, 152 (1963)	7
United States v. Standard Oil Co., 384 U.S. 224, 225 (1966)	10

TABLE OF AUTHORITIES (Continued)

Cases	Page
United States v. Turkette, 452 U.S. 576, 580 (1981)	11
Watt v. Alaska, 451 U.S. 259, 266-67 (1981)	11
Statutes and Rules	
11 U.S.C. § 101 *et seq.*	2
28 U.S.C. § 157	2
28 U.S.C. § 158	2-3, 9, 11
28 U.S.C. § 636	2-5, 8, 11
28 U.S.C. § 1334 (1978)	3, 8, 11
28 U.S.C. § 1334 (1984)	2-3
SUP. CT. R. 17.1	5
SUP. CT. R. 21.1(f)	3
Local Rule 1.3 of the United States District Court of the Northern District of Texas, Dallas Division	8
Order for Adoption of Rules for the Exercise of Powers and Performance of Duties by United States Magistrates for the Northern District of Texas (Misc. Rule No. 6) (N.D. Tex. Amended Mar. 2, 1982)	8
Special Order Relating to Bankruptcy Cases (Misc. Rule No. 33) (N.D. Tex. Aug. 3, 1984)	2

No.

In The

Supreme Court of the United States

October Term, 1987

BAKER, SMITH & MILLS, P.C.
f/k/a BAKER, MILLER, MILLS & MURRAY, P.C.,
Petitioner,

v.

MINEREX ERDOEL, INC., KARL-HEINZ KRUGER and OTTO HACKOBER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

This petition seeks review of a decision of the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit" or "Court of Appeals") which is reported as *Minerex Erdoel, Inc. v. Sina, Inc.*, 838 F.2d 781

(5th Cir. 1988). That decision vacated and remanded an unreported decision by the United States Magistrate for the Northern District of Texas, Dallas Division (the "Magistrate"), which was rendered pursuant to an Order of the United States District Court from the same district (the "District Court"), referring (with the consent of the parties) an appeal from a decision of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Bankruptcy Court") to that Magistrate.

JURISDICTION

The decision of the Court of Appeals was entered on March 3, 1988. That decision reversed and remanded a decision of the District Court affirming in part a decision of the Bankruptcy Court with regard to Petitioner's litigation representation of four limited partnerships and their common general partner, each of whom had requested reorganization protection pursuant to Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §101 *et seq.* Jurisdiction of the Bankruptcy Court lay under 28 U.S.C. §157 and the *Special Order Relating to Bankruptcy Cases* (Misc. Rule 33) (N.D. Tex. Aug. 3, 1984). Jurisdiction in the District Court lay under 28 U.S.C. §§158, 636 and 1334. Jurisdiction in the Court of Appeals lay under 28 U.S.C. §1294. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. §1254(1).

STATUTES INVOLVED

28 U.S.C. §636

The pertinent text of this lengthy provision is set forth

at page A-26 of the Appendix, pursuant to Sup. Ct. R. 21.1(f).

28 U.S.C. §158

The pertinent text of this lengthy provision is set forth at page A-29 of the Appendix, pursuant to Sup. Ct. R. 21.1(f).

28 U.S.C. §1334 (1978)

The pertinent text of this lengthy provision is set forth at page A-30 of the Appendix, pursuant to Sup. Ct. R. 21.1(f).

28 U.S.C. §1334 (1984)

The pertinent text of this lengthy provision is set forth at page A-31 of the Appendix, pursuant to Sup. Ct. R. 21.1(f).

STATEMENT OF THE CASE

1. Introduction and Proceedings in the Bankruptcy Court.

This Petition raises the question of whether the United States District Courts are prohibited by the Bankruptcy Reform Act of 1978 ("BRA"),[1] as modified by the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA")[2], from referring appeals (with the consent of all parties) from the United States Bankruptcy Courts to United States Magistrates under the Magistrates' Act.

This Petition concerns an appeal from an order of the United States Bankruptcy Court for the Northern Dis-

[1] P.L. 95-958, 95th Cong. 2d. Sess. (1978), *reprinted in* 1978 U.S. Code Cong. and Ad. News (92 Stat.) 2548 *et seq.*

[2] P.L. 98-353, 98th Cong., 1st Sess. (1984), *reprinted in* 1984 U.S. Code Cong. and Ad. News (98 Stat.) 333, *et seq.*

trict of Texas, Dallas Division granting in part a Final Application for Allowance of Fees filed by Petitioner, Baker, Smith & Mills, P.C. ("Baker, Mills"). Baker, Mills had acted as litigation counsel for five debtors in consolidated cases in the Bankruptcy Court.

After an evidentiary hearing and argument, the Bankruptcy Court entered an order awarding Baker, Mills the amount of expenses requested and $40,000.00 of the $50,142.46 requested for fees. Baker, Mills did not appeal that reduction to the District Court.

2. **The Appeal to the District Court and Order of Reference to the Magistrate.**

Respondents appealed the Bankruptcy Court's decision to the District Court. The District Court, upon the express consent of the parties, entered an order referring that appeal to a United Stated Magistrate pursuant to 28 U.S.C. §636(c). (See Appendix at A-12). Based upon his review of the record, the Magistrate agreed with the reasoning of the Bankruptcy Court. He then reduced the fee award by $4,381.00 (because of a purported failure of proof), but otherwise affirmed the Bankruptcy Court's decision. (See Appendix at A-13).

3. **The Appeal of the Fifth Circuit.**

Respondents appealed the Magistrate's decision directly to the United States Court of Appeals for the Fifth Circuit.[3] The initial appeal to the Fifth Circuit, and all briefs filed thereon, addressed the merits of the underlying case. However, while this case was awaiting oral argument before the Fifth Circuit, that Circuit requested

[3] Petitioner also filed a cross-appeal wherein it asserted that the Magistrate's reduction of the fee award was reversible error.

that the parties submit supplemental briefs addressing the issue of whether 28 U.S.C. §636 authorizes reference from the United States District Courts to the United States Magistrates of appeals from decisions of the United States Bankruptcy Court in light of *Matter of Elcona Homes Corp.*, 810 F.2d 136 (7th Cir. 1988). *Minerex, supra,* 838 F.2d at 782.

Both parties submitted briefs on that issue. Petitioner argued that reference by consent was authorized. Respondents argued to the contrary. On March 3, 1988, the Fifth Circuit held that the District Court's referral of the bankruptcy appeal to the Magistrate was prohibited. *Id.* at 781. The case was remanded to the District Court for consideration of the appeal from the Bankruptcy Court on the merits. *Id.* at 786.[4]

REASONS FOR GRANTING THE PETITION

I.

SPECIAL AND IMPORTANT REASONS EXIST FOR WRIT OF REVIEW ON CERTIORARI

The decision of whether to grant a Petition for Writ of Certiorari rests, of course, within the sound discretion of this Court. Nonetheless, this Court has often granted certiorari when there are "special and important reasons therefor." Sup. Ct. R. 17.1. Such reasons include the existence of important questions relating to the administration or enforcement of federal laws and novel questions involving the interplay of federal laws. Those reasons exist here.[5]

[4] The Fifth Circuit's opinion was addressed exclusively to the propriety of such referrals, and did not address any other issues raised in the appeal to the Fifth Circuit.

[5] *See, e.g., Donaldson v. United States,* 400 U.S. 517, 522 (1971)

More specifically, the Fifth Circuit's decision precludes the United States District Courts from referring Bankruptcy appeals to United States Magistrates even with the consent of the parties. It profoundly impedes the ability of trial courts to efficiently administer their dockets. Consequently, resolution of this issue will have a profound impact on the efficiency of the United States District Courts.

This Court has emphasized the importance of the efficient administration of District Court dockets and the vital role served by the Magistrates' Act in providing relief for overburdened judges. *Mathews v. Weber,* 423 U.S. 261, 268 (1976) (Congress, in contemplating the Magistrates' Act, recognized "that a multitude of new statutes and regulations had created an avalanche of additional work for the district courts which could be performed only by multiplying the number of judges or giving judges additional assistance."); *Accord, Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 546 (9th Cir. 1984):

> There are compelling reasons for the creation of an infrastructure for determining certain civil cases with the consent of the parties and subject to judicial control. Article III courts have the task of ad-

---

footnote 5, *continued*

(important questions relating to administration and enforcement of federal revenue laws raised); *United States v. An Article of Drug ... Bacto-Unidisk ...*, 394 U.S. 784, 791 (1969) (certiorari granted because interpretation of the Federal Food, Drug and Cosmetic Act raised issues of importance in the administration of that Act); *United States v. Muniz,* 374 U.S. 150, 152 (1963) (review involving important question of construction of the Federal Tort Claims Act); *Kossick v. United Fruit Co.,* 365 U.S. 731, 733 (1960) (certiorari granted because case presented novel questions as to interplay of state and maritime law.)

> judicating an ever-mounting volume of cases. Further, the entire character of litigation that federal courts principally face is changing.... The Magistrate Act was shaped by these considerations. *See* S.Rep. No. 74, 96th Cong., 125 Sess. 4-5, *reprinted in* 1979 U.S. Cong. & Ad. News 1469, 1472-74.

Id. at 547.

The limitations on the use of Magistrates created by the Fifth Circuit frustrates congressional efforts to reduce the burden on District Courts. Furthermore, because the Fifth Circuit's decision (as well as that of the Seventh Circuit) has a significant potential impact upon the effective administration of justice by the District Courts, that decision should be reviewed by this Court.

II.

NOVEL ISSUES CONCERNING THE INTERPLAY OF TWO FEDERAL STATUTES EXIST WHICH SHOULD BE DECIDED BY THE SUPREME COURT

In addition, this Petition raises a novel question concerning the interplay of the BRA, as modified by the BAFJA, and the Magistrates' Act. Specifically, the question presented is whether Congress can be deemed to have intended to limit the broad provisions of the Magistrate's Act so as to exclude referrals of bankruptcy appeals, where the very Act purportedly excluding such referrals (the BAFJA): (1) contains no provision excluding such referrals; and (2) deleted the only statutory provision in existence which expressly prohibited such referrals.

Section 636(c) (1) of the Magistrates' Act provides that:

(c) *Notwithstanding any provision of law to the contrary*

> (1) Upon consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer *may conduct any or all proceedings* in a jury or non-jury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the court or courts he serves.[6]

Id. (Emphasis added). In view of this broad language, it would appear that such jursidiction exists *unless* the Magistrates Act, 28 U.S.C. §631, *et seq.* was specifically limited by later-enacted bankruptcy law. Indeed, the BRA contained a specific statutory prohibition against referral by a District Court of an appeal to a Magistrate or a special master. 28 U.S.C. §1334(c) (1978).[7] However, in response to *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), Congress restructured the Bankruptcy Courts through passage of the BAFJA. Of particular significance, the BAFJA repealed the Express Prohibition of Section 1334 (against referring appeals to magistrates) which had been present in the original BRA.[8] *See Elcona, supra,* 810 F.2d at 139.

---

[6] Such designation has been made by Local Rule 1.3 of the United States District Court for the Northern District of Texas, Dallas Division, pursuant to the *Order for Adoption of Rules for the Exercise of Powers and Performance of Duties by United States Magistrates for the Northern District of Texas* (Misc. Rule No. 6) (N.D. Tex. Amended Mar. 2, 1982).

[7] This prohibition was referred to by the Fifth Circuit, and is referred to herein, as the "Express Prohibition." *See Minerex, supra,* 838 F.2d at 783.

[8] As the Fifth Circuit points out, "the Express Prohibition was just

In addition to the deletion of the Express Prohibition from Section 1334, the BAFJA added 28 U.S.C. §158. That statute provides that the District Courts shall have jurisdiction "to hear appeals from final judgments .... of bankruptcy judges," and further provides that referrals of such appeals to appropriately constituted bankruptcy appellate panels[9] *"may"* be had in appropriate circumstances. *Id.*

However, Section 158 does not state that the appellate jurisdiction of the District Courts is exclusive, nor does it expressly (or impliedly) prohibit referrals of such appeals to the United States Magistrates. Moreover, the District Courts would *retain* both jurisdiction over such appeals and supervisory authority over the Magistrates even if such referrals were made.

> Congress limited the magistrate's role in cases referred to him under [the Magistrates' Act]. The Act's sponsors made it quite clear that the magistrate acts "under the supervision of the district judges when he accepts a referral, and that authority for making final decisions remains at all times with the district judge ..." [A] district judge would retain ultimate responsibility for decision making in every instance in which a magistrate might exercise additional duties jurisdiction."

Mathews, supra, 423 U.S. at 270.

Nevertheless, the Fifth Circuit has found an implicit intent on the part of Congress to prohibit referrals of bankruptcy appeals in the face of Congress' deletion of

---

footnote 8, continued
plain gone altogether" upon enactment of the BAFJA. *Minerex, supra,* 838 F.2d at 786.

[9] The Fifth Circuit has not established such a panel. *Minerex, supra,* 838 F.2d at 786, n.23.

the only explicit prohibition contained in the United States Code. However, the Fifth Circuit's analysis contravenes the rules articulated by this Court for statutory construction.

This Court has explained that where Congress includes limiting language in an earlier version of a statute but deletes such language in the enactment of a later version, it may be presumed that the limitation was not intended. *Russello v. United States,* 464 U.S. 16, 23-24 (1983). Judicial construction cannot be utilized to encompass within a statute's meaning something obviously omitted from its terms. *United States v. Standard Oil Co.,* 384 U.S. 224, 225 (1966); *United States v. Brown,* 333 U.S. 18, 25-26 (1948).

Furthermore, where two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed contrary congressional intention, to give effect to each in a consistent and harmonious manner. *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1018 (1984); *Watt v. Alaska,* 451 U.S. 259, 266-67 (1981). However, in this case, the Fifth Circuit has interpreted 28 U.S.C. §158 in a vacuum, ignoring the compatible provisions of the Magistrates Act.

It is clear from these rules of construction that jurisdiction exists for the District Court to refer bankruptcy appeal matters to a Magistrate by consent. When Congress deleted that Express Prohibition in the transition from the BRA to the BAFJA, it must have intended that the prohibition should cease. Any other interpretation would render the deletion of former section 1334(c) a

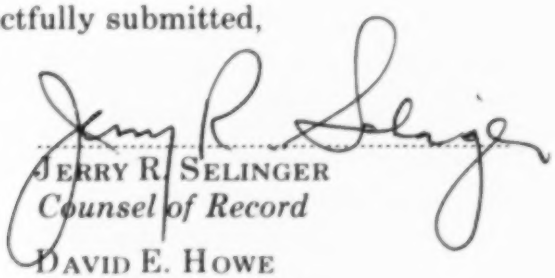
nullity. Such an interpretation is, therefore, impermissible. *United States v. Turkette,* 452 U.S. 576, 580 (1981); *see United States v. Mendoza,* 565 F.2d 1285, 1289 (5th Cir. 1978). Moreover, consideration of the strong legislative intent expressed in the very terms of subpart (c) of the Magistrates' Act, and the BRA/BAFJA transition ineluctably leads to the conclusion that jurisdiction exists for referrals of bankruptcy appeals to Magistrates by consent under Section 636(c) and that such referrals are not prohibited by Section 158.

This question, moreover, remains one which *should* be addressed by the Court. If review is not granted, the interplay between the BRA-BAFJA and the Magistrates' Act will remain incorrectly construed, and thus the efficient administration by the District Courts of their dockets will be impaired.

CONCLUSION

In view of the foregoing, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,



JERRY R. SELINGER
Counsel of Record

DAVID E. HOWE
ALYSON C. DOVER
BAKER, MILLS & GLAST, P.C.
500 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201-2916

(214) 220-8200

Attorneys for Petitioner

APPENDIX

APPENDIX

MINEREX ERDOEL, INC., et al.,
Plaintiffs-Appellants,
Cross-Appellees,

v.

SINA, INC., et al.,
Defendants

Baker, Smith & Mills, f/k/a Baker, Miller,

Mills & Murray, Defendants-Appellees

Cross-Appellants

No. 86-1449.

United States Court of Appeals,
Fifth Circuit.

March 3, 1988.

Appeals from the United States District Court
for the Northern District of Texas

Before CLARK, Chief Judge, BROWN, and JOHNSON, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

Nominally this appeal concerns the proper allowance of counsel fees in a bankruptcy case. We never get to the merits of that controversy, because the District Court on the appeal from the bankruptcy court referred the appeal to a magistrate for determination. We hold such reference improper and reverse the unauthorized decision by the magistrate.

In the Beginning

The firm of Baker, Smith and Mills originally under-

took simultaneously to represent before the bankruptcy court both (i) a set of four limited partnerships that all filed for reorganization protection pursuant to Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, and (ii) a corporation, Sina, Inc., which served as a general partner of each of those four limited partnerships. A second corporation, Minerex Erdoel, Inc., which also served as a general partner of each of those same four limited partnerships, protested allowance of Baker, Smith's fees. Minerex alleged that the existence of a dispute over the amount of the "management fee" due to Sina, Inc. from the four limited partnerships created a conflict of interest which precluded simultaneous representation of Sina, Inc. and the four limited partnerships.

Without expressly addressing the issue of a conflict of interest, the bankruptcy court awarded Baker, Smith the full amount of expenses and approximately 80 percent of the fees the firm had requested. The bankruptcy court expressly provided, however, that these awards were subject to later reallocation or reassessment.

Minerex appealed that decision to the District Court, and upon the express consent of the parties, the District Court referred that appeal to a United States magistrate, 28 U.S.C. § 636.[1] The magistrate concluded that "it is clear that the bankruptcy judge necessarily found [that] no conflict existed between the interest of Sina, Inc. and of the

[1] 28 U.S.C. § 636 provides in pertinent part:

(c) Notwithstanding any provision of law to the contrary —

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgments in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves.

[four] limited partnerships in [Baker, Smith's] representation." The magistrate reduced the fee award by $4,381.00, but otherwise affirmed the bankruptcy court order, with no further review by the District Court. Then followed this appeal by Minerex of the allowance of the fees and expenses to Baker, Smith and the cross-appeal by Baker, Smith of the reduction in the fee.

New Light from the Seventh

While the case was awaiting oral argument before this court, the Court of Appeals for the Seventh Circuit handed down its decision in *In the Matter of Elcona Homes Corporation,* 810 F.2d 136 (7th cir. 1987), in light of which we requested supplemental briefs addressing the issue of whether § 636 authorizes reference to a United States magistrate of an appeal from a bankruptcy court decision. We do not reach the merits of the fee dispute, because we here examine 28 U.S.C. § 158[2] and decide that such a reference is not authorized. Accordingly, we vacate the judgment and remand with instructions that the District Court itself consider the appeal from the bankruptcy court.

Back of the Beginning: The Origin of the Bankruptcy Reform Act of 1978

In order to determine whether or not Congress intended for appeals from bankruptcy court decisions to be included within the very wide range of matters which § 636 permits a District Court to refer to a magistrate, it is necessary to trace through in some detail the fairly tumultuous course of changes in the United States Bankruptcy Court system that began with the major reconstruction effected by the Bankruptcy Reform Act of 1978

[2] *See* n. 21, *infra,* for the text of this section.

(BRA).[3] That Act created a bankruptcy court in each judicial district, as an "adjunct to the district court."[4] The judges of these bankruptcy courts were to hold office for a term of fourteen years[5] and be paid a salary subject to annual adjustment upward or downward.[6] Section 241(a) of BRA added a new Chapter 90 to Title 28 of the U.S. Code, concerning the relationship between the district courts and the bankruptcy courts. That chapter included § 1471, which prescribed the jurisdiction of the bankruptcy courts.[7]

For purposes of the instant case, the most important change effected by BRA was accomplished in § 238(a) of the Act, which completely rewrote 28 U.S.C. § 1334[8] con-

[3] P.L. 95-598, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S. Code Cong. and Ad. News (92 Stat.) 2549 *et seq.*

[4] Section 201(a) of BRA (28 U.S.C. § 151(a)).

[5] Section 201(a) of BRA (28 U.S.C. § 153(a)).

[6] Section 201(a) of BRA (28 U.S.C. § 154). The adjustments are made under § 225 of the Federal Salary Act of 1967 (2 U.S.C. §§ 351-361) and are subject to 28 U.S.C. § 461.

[7] 28 U.S.C. § 1471 reads as follows:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

(d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

(e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case.

[8] 28 U.S.C. § 1334 as enacted in BRA provided as follows:

cerning appeals from bankruptcy court decisions. Under that change, § 1334 provided, in subsections (a) and (b), that under certain conditions the District Court of the district in which a bankruptcy court operated would have non-discretionary[9] jurisdiction of appeals from all final judgments, orders, and decrees and permissive jurisdiction of appeals from interlocutory orders of the bankruptcy court of that district. Sub-section (c) of 28 U.S.C. § 1334 contained a provision explicitly stating that "a District Court may not refer an appeal under that section to a magistrate or to a special master." Because of its extreme importance, we refer to this provision as the "Express Prohibition." Offhand, the antecedent of the words "that section" appearing in § 1334(c) would seem to be the phrase "section 160 of this title" appearing in § 1334(a).[10] But as pointed out in n. 10, *supra*, two courts

---

footnote 8 *continued*

Bankruptcy Appeals

(a) The district courts for districts for which panels have not been ordered appointed under section 160 of this title shall have jurisdiction of appeals from all final judgments, orders, and decrees of bankruptcy courts.

(b) The district courts for such districts shall have jurisdiction of appeals from interlocutory orders and decrees of bankruptcy courts, but only by leave of the district court to which the appeal is taken.

(c) A district court may not refer an appeal *under that section* to a magistrate or to a special master.

(Emphasis supplied).

[9] *See In re Bestmann*, 720 F.2d 484 (8th Cir. 1983).

[10] If that is indeed the case, § 1334(c) is superfluous or nonsensical, since an appeal under 28 U.S.C. § 160 is heard not by a district court, but instead by a panel of bankruptcy judges with further appeal directly to the court of appeals, 28 U.S.C. § 1293. Under basic principles of statutory construction, "where the language of a statute is of doubtful meaning or where an adherence to the strict letter would lead to absurdity, or to contradictory provisions, . . . the real meaning of the statute is to be ascertained and declared, even though it seems to conflict with the words of the statute." 82 C.J.S. *Statutes* § 322(b)(3) (1953). *See also United States v. American Trucking Associations*, 310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed.

in *Elcona* and *Morrissey* read § 1334(c) as if the words "that section" were absent. On this reading the words should be "this section," signifying § 1334 itself and *not* 28 U.S.C. § 160.

The legislative history of BRA does not address specifically the reasons for the enactment of the Express Prohibition. That legislative history does show, however, that Congress was quite conscious of the fact that, because the bankruptcy judges lacked life tenure and protection against salary diminution, the Bankruptcy Court it sought to create could not stand against Article III of the U.S. Constitution[11] unless Congress made that court to a sufficient extent the creature of the District Court.[12]

footnote 10 *continued*

1345 (1940), *reh'g denied*, 311 U.S. 724, 61 S.Ct. 53, 85 L.Ed. 472. Two other courts have previously undertaken to ascertain and declare that "real meaning" with respect to § 1334(c). *In Re Morrissey*, 717 F.2d 100 (3rd Cir. 1983) (while finding § 1334(c) "unambiguous," court declared that it "prohibited a district court from referring a bankruptcy appeal to a magistrate"); *In the Matter of Elcona Homes Corporation*, 810 F.2d 136 (7th Cir. 1987) ("under the BRA, district courts clearly were prohibited from referring appeals from bankruptcy court decisions to magistrates: 'A district court may not refer an appeal . . . to a magistrate or to a special master.'") (quoting 28 U.S.C. § 1334(c) (1982) and also citing *Morrissey*; omission as in original quotation).

[11] Article III provides that:

[t]he judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1.

[12] *See* S. Rep. No. 95-989, 95th Cong., 2d Sess. 16 (1978), *reprinted in* 1978 U.S. Code Cong. and Ad.News 5787, 5802. This awareness may be what prompted Congress to enact the Express Prohibition. It is not necessary here to do more than set forth this possibility appearing in the legislative history, because as we elaborate, congressional intent in the enactment or repeal of the Express Prohibition has less, if any, significance in our analysis than the intent that underlay congressional actions in enacting the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA).

The year following BRA, Congress in the Federal Magistrate Act of 1979 (FMA)[13] promulgated extensive additions to the original Magistrates Act.[14] Section 2 of the FMA amended 28 U.S.C. § 636 for the purpose of enlarging the civil and criminal jurisdiction of United States magistrates in order to improve access to the federal courts.[15] Following that amendment, § 636 contained the language quoted at note 1 above, which expanded the authority of magistrates to encompass the conducting of "any or all proceedings in a jury or nonjury civil matter." That language appeared directly to contradict the Express Prohibition, which was at that time still in place and which forbade reference of bankruptcy appeals to magistrates.[16]

The Fallout of Marathon

The next twist in the saga of the bankruptcy courts came with the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). There the Court ruled that "the broad grant of jurisdiction to the bankruptcy courts contained in 28 U.S.C. § 1471 (1976 ed., Supp. IV) [was] unconstitutional." *Id.*, at 87, 102 S.Ct. at 2880. More specifically, "[t]he case's holding is that adjudication in federal courts on questions of state law [which § 1471 would permit] cannot [constitutionally] be

[13] S. 237, 96th Cong., 1st Sess. (1979), *reprinted in* 1979 U.S.Code Cong. and Ad.News (93 Stat.) 643 *et seq.*

[14] S. 945, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S. Code Cong. and Ad.News 1280 *et seq.*

[15] S.Rep. No. 96-74, 96th Cong., 1st Sess. 1 (1979), *reprinted in* 1979 U.S. Code Cong. and Ad.News 1469, 1469.

[16] If a direct conflict existed, § 636 would likely prevail both because it was more recent than the Express Prohibition and because the expansion of magistrates' authority effected by § 636 was made "[n]otwithstanding any provision of law to the contrary." *Contra, see In re Morrissey*, 717 F.2d 100 (3rd Cir.1983) at 103, n. 4.

made by officers of the United States who neither enjoy life tenure nor are controlled by life-tenured judges to a greater degree than were bankruptcy judges under [BRA]." Appendix 1 L. King, Collier on Bankruptcy 1672 (15th ed. 1979).

Four opinions were filed in *Marathon*,[17] containing conflicting signals which limited the utility of that decision as guidance for Congress. Even so, the decision did convey as much as that if the bankruptcy courts were brought somehow under the wing of the Art. III courts to a greater extent, then they could stand under Art. III. Congress pursued that goal in two ways when it responded to *Marathon* in the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA).[18] First, BAFJA emphasized the structural relationship between the bankruptcy court and the Art. III courts, by expressly providing that the bankruptcy judges in each judicial district "shall constitute a unit of the district court to be known as the bankruptcy court for that district."[19] Second, BAFJA specifically prescribed the treatment of appeals from the rulings of bankruptcy judges. BAFJA did so by gathering together the several scattered provisions of the BRA[20] which dealt with various aspects of bankruptcy appeals and assembling them into a single

[17] Justice Brennan wrote the opinion for the plurality, joined by Justices Marshall, Blackmun and Stevens. Justice O'Connor joined in an opinion by Justice Rehnquist concuring in the judgment. Finally, Chief Justice Burger filed a dissenting opinion of his own and along with Justice Powell also joined in a second dissenting opinion by Justice White.

[18] H.R. 5174, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.Code Cong. and Ad. News (98 Stat.) 333 *et seq.*

[19] Section 104(a) of BAFJA (28 U.S.C. § 151).

[20] Those codified at 28 U.S.C. §§ 160, 1293, 1334, 1408, and 1482.

comprehensive scheme for such appeals, which BAFJA codified at 28 U.S.C. § 158.[21] BAFJA also completely rewrote 28 U.S.C. § 1334. By it the Express Prohibition was repealed by simple omission.[22] BAFJA did not elsewhere preserve the Express Prohibition by incorporating it or words to the same effect into some other section of either Title 11 or Title 28; the Express Prohibition was just plain gone altogether.

[21] Section 104(a) of BAFJA added 28 U.S.C. § 158, which provides as follows:

> Appeals:
> (a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.
> (b)(1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.
> (2) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.
> (3) A panel established under this section shall consist of three bankruptcy judges, provided a bankruptcy judge may not hear an appeal originating within a district for which the judge is appointed or designated under section 152 of this title.
> (c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.
> (d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

[22] Following BAFJA, 28 U.S.C. § 1334 (except for one technical correction made in 1986) was identical to the current version of that section:

> Bankruptcy cases and proceedings:
> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
> (b) Notwithstanding any Act of Congress that confers exclusive

We are firmly convinced that § 158 can and must be taken at face value. Section 158 provides an intricate, balanced, and elaborate scheme for bankruptcy appeals carefully and thoughtfully crafted by Congress. Under that scheme, appeals could be taken either to (i) the District Court or (ii) to a panel of bankruptcy judges.[23] No other type or kind of appeal was recognized, acknowledged, or permitted under that scheme. Nor is there even any indication in the legislative history of BAFJA that any other type or kind of appeal ever was contemplated.

---

footnote 22 continued

jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

[23] The judicial council of the Fifth Circuit has never yet acted, as authorized by § 158(b)(1), to "establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit" to hear appeals from bankruptcy court decisions. Until and unless we do so, bankruptcy appeals in the Fifth Circuit may be heard only by the District Court for the judicial district in which the bankruptcy judge rendering the decision is serving.

It is reasonable to conclude that had Congress meant for its appeals scheme to include the potential for reference to a magistrate, Congress would have expressly so provided. Congress did not do so. Congress intended that its § 158 scheme be comprehensive and complete in itself, and that the avenues for which it expressly provided be the exclusive routes for bankruptcy appeals. Congress' perception that its final product was indeed comprehensive and complete is reflected by its simultaneous deletion of the Express Prohibition in the newly enacted § 1334 (*see* n. 22, *supra*).

We hold that the reference by the District Court to a United States magistrate of an appeal from a bankruptcy court decision was not proper. Such appeals may be heard only as expressly provided in 28 U.S.C. § 158.[24] We vacate the decision of the District Court and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

---

[24] In *U.S. v. Ford*, 824 F.2d 1430 (5th Cir. 1987) (en banc), this court held that District Courts lack authority under 28 U.S.C. § 636(b)(3) "to delegate to a magistrate as an 'additional duty' the power to preside over the selection of the jury in felony cases." The conclusion we draw here is not inconsistent with the result we reached there. The ruling in *Ford* turned primarily on § 636 and not, of course, on § 158 or any of the other Judicial Code provisions enacted by BAFJA and germane only to bankruptcy.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
Dallas Division

Civil Action No.
CA 3-85-1099-T

MINEREX ERDOEL, INC., et. al.,
Plaintiffs,

v.

BAKER, SMITH & MILLS, et al.,
Defendants.

ORDER

On September 12, 1985, the parties filed their required status report. It appears from such status report that the parties have consented in writing to trial in this case before a United States Magistrate in accordance with 28 U.S.C §636(c).

It is therefore **ORDERED** by the court that this case be, and it is hereby, **REFERRED** to the United States Magistrate for the conduct of all further proceedings and the entry of judgment in accordance with 28 U.S.C. §636(c), with any appeal therefrom to be taken to the United States Court of Appeals for the Fifth Circuit in accordance with 28 U.S.C. §636(c)(3).

SO ORDERED.

September 17, 1985.

/s/ A. JOE FISH
A. Joe Fish
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
Dallas Division

CA3-85-1099-AH

MINEREX ERDOEL, INC., et al.,
vs.
BAKER, SMITH & MILLS, et al.,

MEMORANDUM OPINION AND ORDER

Pursuant to the provisions of 28 U.S.C. §636(c) and the written consent of the parties came on to be considered the appeal from the Bankruptcy Court's Order filed on December 7, 1984, and its subsequent memorandum opinion filed on March 13, 1985, granting an Application of Award of Fees to the law firms of Baker, Smith and Mills, and McDonald, Carano, Wilson, Bergin, Frankovich & Hicks, and having considered the briefs of the affected parties and the record filed for appellate review, the court makes the following findings of fact, conclusions of law and orders as follows:

Parties: The Appellants are Minerex Erdoel, Inc., Karl-Heinz Krueger and Otto Hackober. The Appellees are the law firms of Baker, Smith & Mills (Baker, Smith) and of McDonald, Carano, Wilson, Bergin, Frankovich & Hicks (McDonald, Carano).

Issues Presented on Appeal

1. Did the Bankruptcy Court err in requiring the Debtor-limited partnerships to pay the attorneys' fees of the separate estate of the Debtor-general partner?

2. Did the Bankruptcy Court err in awarding attorneys' fees because of a conflict of interest which existed in the attorneys' representation of both the Debtor-limited partnerships and the Debtor-general partner?

Statement of Facts: In order to understand the Bankruptcy Court's order and to assay whether such order was proper or erroneous, a brief overview of the factual setting as it existed prior to these bankruptcy proceedings and after the petitions were filed, is appropriate and necessary.

The five relevant debtors are Sina, Inc. (Sina, Inc.), a Nevada corporation, and four Nevada limited partnerships, Sina 77/78 Ltd., Sina 78/79 Ltd., Sina 79/80 Ltd., and Sina 80/81 Ltd. (Sina Limited Partnerships).

Each of the four limited partnerships was organized as part of a series of tax-sheltered oil and gas ventures in the United States which was marketed to German national investors. In turn each of the limited partnerships was comprised of a three-tiered structure designed to maximize tax sheltering benefits to individual investors. The bottom tier consisted of investment programs (Beteiligungsprogramme), silent partnerships purchased by individuals. The second tier consisted of a limited German partnership (Kommandatitsgessellschaft or KG) comprised of the silent partnership(s) as a limited partner and Minerex Erdoel und Gasfoerderungs GmbH & Co. (Minerex GmbH), a German corporation as the general partner. The third tier consisted of a Sina Limited Partnership comprised of one of the German partnerships (KG's) as a limited partner and Sina, Inc. as the general partner. Each Sina Limited Partnership was structured as a Nevada limited partnership.

The capital utilized to underwrite each Sina Limited

Partnership drilling program came from the German individuals' investments. Sina, Inc. was responsible to hire personnel to operate and oversee the drilling programs for which it received compensation from each Sina Limited Partnership.

In the spring of 1982 the relationship between the German investors and Sina, Inc., took a turn for the worse. At this time the cost of oil exploration had increased, and there is some indication from the record that German taxing entities began to scrutinize tax sheltering programs such as the Sina Limited Partnerships. The precipitating factor, however, appears to be the individual investors' dissatisfaction with the meager income, if any, generated by the partnerships and Sina, Inc.'s method of reporting expenditures and its general administration of the partnerships. As a result an agreement was reached whereby a co-general partner, controlled by the individual investors, was appointed, which was given veto power over expenditures on behalf of the Sina Limited Partnerships. Minerex, Inc., one of the Appellants, was organized as a Nevada corporation, and became the general co-general partner with Sina, Inc. in the limited partnerships in the summer of 1982.

The success of this attempted resolution proved to be short lived. The representatives of Minerex, Inc. apparently believed that Sina, Inc. was continuing to make unauthorized expenditures from the Sina Limited Partnerships for its own benefit and was approving payments to others which were inappropriate. For its part, Sina, Inc. took the stance that Minerex, Inc., had taken an obstructionist position and was refusing to authorize needed expenditures which in turn threatened the economic viability of the partnerships. Notwithstanding this uneasy

relationship Minerex, Inc.'s term as a co-general partner was extended. However, Sina, Inc. instituted a suit in a Nevada State court seeking a declaration of its right to fees from the partnership entities and for an accounting. Minerex, Inc., sought the appointment of a receiver in Nevada, and also obtained an *ex parte* temporary restraining order maintaining its status as a co-general partner with Sina, Inc. Minerex, Inc. obtained a hearing date for a preliminary injunction in the Nevada State court to be held on April 15, 1983.

On April 14, 1983, the Sina Limited Partnerships filed voluntary petitions in bankruptcy in this court, and on April 15, 1983, before the Nevada State court hearing commenced Sina, Inc. filed its petition in this court. The appellee law firms participated in the filing of each of the bankruptcy petitions. In the schedules filed by the Sina Limited Partnerships the Applicants-Appellees, acting as co-counsel, listed management fees owed to Sina, Inc. as liquidated, undisputed debts. This did not end the chain of events, but the above provides a sufficient factual background for consideration of the issues presented in this appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Although listed second in the Appellants' brief the conflict of interest issue is the predominant issue and is therefore considered initially. Appellants correctly observe that Judge Ford did not expressly consider the conflict of interest issue in either this December 7, 1984 order or the memorandum opinion which followed on March 13, 1985. However, in the face of the Supreme Court's decision in *Woods v. City National Bank & Trust Co.*, 312 U.S. 262, 268 (1941), holding that when an *actual* conflict of interest

exists compensation to counsel should be denied, it is clear that the Bankruptcy Judge necessarily found that no conflict existed between the interests of Sina, Inc. and of the Sina Limited Partnerships in Applicant-Appellees' representation for which Judge Ford found that they are entitled to compensation.

Although Appellants cite case authority which holds that conflict of interest issues are matters of law, e.g. *Matter of Philadelphia Athletic Club, Inc.*, 20 B.R. 328, 331-332 (E.D. of Pa. 1982), the law in this Circuit is that such issue raises matters of fact as well as law. *Brennan's v. Brennan's Restaurant, Inc.*, 590 F.2d 168, 173-74 (5th Cir. 1979); *Matter of Consolidated Bancshares, Inc.*, ___ F.2d ___ (No. 85-1626, 5th Cir. 1986, slip opinion 4572, et seq, at page 4583). On questions of fact Rule 8013 of the Rules of Bankruptcy Procedure requires the court to accept findings of fact unless clearly erroneous.

Conflicts of interest questions present a particularly complex area in the context of bankruptcy proceedings. While it is clear from the Supreme Court's decision on *Woods*, supra, that the courts must guard against actual conflicts, the bankruptcy courts must also approach such issues with the knowledge that actions designed to insure against the possibility of any conflict may well encumber the bankrupt estate with additional attorneys and administrative expenses to the detriment of both creditors and the petitioning party seeking reorganization under Chapter 11. Because of the great volume of cases coming before it the Bankruptcy Judge must heavily rely on the advice and counsel of attorneys and other professionals in discharging his duties. Accordingly the questions of conflict in the context of bankruptcy proceedings must be determined in light of the practical realities which exist in such

proceedings. *In re Carla Leather, Inc.*, 44 BR 457, 474 (S.D. N.Y. 1984); *In re Iorizzo*, 35 B.R. 465, 466-68 (Bankr. E.D. N.Y. 1983).

The schedules filed by the Sina Limited Partnerships reflecting liquidated sums owed to Sina, Inc. unquestionably demonstrate a potential conflict of interest between the estates of the partnerships and the corporation. However, this potential conflict cannot be said to have ripened into an actual conflict unless it appears from the record that the Applicant-Appellees seek compensation for services performed in which they took an adversarial posture vis-a-vis the interests of their several clients.

Notwithstanding this potential for conflict of interest Appellants did not interdict an objection to the Applicant-Appellees' application for a nunc pro tunc order approving Baker, Smith as co-counsel for all five petitioners. The bankruptcy court entered its order approving the application on August 26, 1983.

From the record on appeal it appears that the first occasion that Minerex, Inc. squarely raised a conflict of interest claim in opposition to the Appellees' application for compensation was in its Memorandum in Support of Motion to Disqualify Debtors' Counsel and in opposition to Second Applications for Interim Fees (Appendix, Volume I, Item 5). On April 13, 1984, the Bankruptcy Judge entered an order approving the second application.[1] A similar objection was made to Baker, Smith's Third Interim Application for Allowance of Fees and Expenses (Id, Vol. I, Item 8). On August 1, 1984, the District Court entered its order granting Baker, Smith's application in part and without prejudice to Baker, Smith's right to seek

[1] A copy of this order has not been included in the Appendix.

the balance of fees requested. The court determined *inter alia* that Baker, Miller had met the guidelines for representation previously imposed and that the services rendered were in good faith (Id, Vol. I, Item 9).[2]

The final application which is at issue, was filed by Baker, Miller on or about October 25, 1984, (Id, Vol. I, Item 10). Appellants filed their opposition which again raised the conflict of interest claim (Id, Vol. I, Item 11). Following a hearing on Appellees' application on December 7, 1984, the Bankruptcy Judge awarded a substantial portion of the fees sought by Baker, Miller and apparently all of the compensation sought by McDonald, Carano (Id, Vol. I, Item 12) implicityly rejecting Appellants' conflict of interest claim for the third time.[3]

As noted above, the standard of review of fact findings is the clearly erroneous test. Accordingly the Appellants shoulder the burden of demonstrating that the Appellees were performing under a conflict of interest while rendering services for which they were compensated from February 18, 1984 through September 24, 1985.[4]

---

[2] The first three orders granting Appellees' interim attorneys' fees and expenses are not before the court on his appeal, but are related to flesh out the factual background leading up to the order which is the subject of this appeal.

[3] It is not entirely clear from the pleadings whether Appellants are attacking the award of fees to McDonald, Carano. However, if it be assumed that such a claim is asserted, Appellants have waived their right to complain since both the record on appeal and Appellants' Brief filed on October 15, 1985 and their Reply Brief filed on December 31, 1985, are totally silent on this issue. *United States v. Miller*, 666 F.2d 991, 998, n. 6 (5th Cir.), cert. den. 456 U.S. 964 (1982).

[4] In granting Applicants' Third Interim application in part in the sum of $30,000.00 in fees and $7,125.26 for expenses, the District Court did not disallow any specific item sought by Baker, Miller nor did it attribute the award made to any specific work of counsel or expense incurred (Appendix, Vol. I, Item 9). Therefore the court must also review the schedule of charges attached to Applicants' Third Interim Application as well.

Appellants argue that resolution of the conflict of interest issue requires that the court consider the underlying "management fee" dispute between Sina, Inc. and the Sina Limited Partnerships. Although the record demonstrates that the amount of fees and the circumstances under which such fees would accrue as obligations of the limited partnerships in favor of the corporation are disputed matters, the resolution of which will unquestionably affect the value of the petitioners' estates, this issue is irrelevant to the matter under review except to the extent that it appear that Applicants-Appellees seek recovery of fees and expenses incurred in advancing the adversarial interests of Sina, Inc. against the estates of the limited partnerships. Such efforts would constitute an actual conflict of interest which would preclude recovery of any fees. *Woods v. City National Bank & Trust Co.*, supra.

In considering Judge Ford's award of fees and expenses under the clearly erroneous standard the court has reviewed the schedules of fees and expenses submitted contemporaneously with Applicants' Third Interim Application and their final application (Id. Vol. I, Items 7 and 10), the testimony presented at the evidentiary hearing on December 7, 1984, and the historical events related in the Bankruptcy Judge's memorandum opinion filed on March 13, 1985.

During the fee period in question Karl-Heinz Kruger and others filed an adversary proceeding against Sina, Inc. and the Sina Limited Partnerships seeking to institute a class action for damages in excess of $100,000,000.00. Baker, Smith filed a joint motion to dismiss on behalf of all petitioners together with a memorandum brief. This unified response, seeking dismissal on procedural grounds only, did not assert an adversarial

posture between the corporation and the partnerships (See Exhibit 7, Appendix to Appellees' Brief). Appellees also instituted an adversary proceeding on behalf of all petitioners against Messrs. Karl-Heinz Kruger and Otto Hackober for alleged destruction of the economic value of the limited partnerships. The applicants have proceeded in good faith in representing the interests of all petitioners and are entitled to compensation.

Part of the fees and expenses sought by Applicants-Appellants pertain to their efforts in preparing for and participating in the Rule 2004 deposition of Peter Lang Nevin, Sina, Inc.'s president which took place in February 1984 for which Mr. Selinger charged 33.7 hours at the rate of $130.00 per hour ($4,381.00). The record is devoid of any indication that these activities benefitted the limited partnerships or that the deposition inquiry was directed to the estates of the partnerships. Where the work performed was primarily, if not exclusively, related to the affairs of only one debtor, fees for such work should not be taxed against the estates of the other debtors. *J.J. Bradley & Co., Inc.*, 2 C.B.C. 2nd 1245 (Bankr. S.D. N.Y. 1980). Insofar as the Applicants seek recovery for fees incurred in representing Sina, Inc.'s president during the deposition in February 1984, such award against the limited partnerships' estates is without support in the record, and the Bankruptcy Judge's order to such extent is clearly erroneous.

The second issue presented for review is whether the bankruptcy court abused its discretion in requiring that Applicants' fees award be paid from the estates of the limited partnerships.

As with all previous orders granting attorneys' fees in these bankruptcy proceedings, the Bankruptcy Judge's award was without prejudice to reallocation, assessment

and payments of fees to responsible parties in the adversary proceedings. Thus while Appellants argue that the fee award is borne by the limited partnerships to the exclusion of Sina, Inc., the court's order makes it patently clear that the fees can be shifted among the estates of the petitioners, if warranted, following resolution of the adversary proceedings.

Of equal importance and apparently crucial to the Bankruptcy Judge's decision was the fact that the Appellants agreed to an order regarding interim operations of the debtor parties (*Id.* Vol. I, Item 13, Memorandum Opinion at page 8). As recited in the opinion this order (Brief, Exhibit 6) provided *inter alia* that all on-going cash payments from the Sina Limited Partnerships to Sina, Inc. would be suspended, leaving Sina, Inc. without any liquid assets. Karl-Heinz Kruger, one of the appellants, executed this order on behalf of Minerex, Inc. Likewise Appellants' present counsel approved the order signed on June 24, 1983.

Having participated in a negotiated agreement whereby all liquid assets would remain in the estates of the limited partnerships, the Appellants are precluded from showing an abuse of discretion on the part of the Bankruptcy Judge in awarding attorneys' fees for services performed for the benefit of the estates of the limited partnerships as well as the corporation, particularly where the allocation of the award is subject to change based on subsequent developments.

IT IS THEREFORE, ORDERED that the Bankruptcy Judge's order of December 7, 1984, is affirmed in part and modified in part as follows:

The order granting allowance of fees to the McDonald, Carano law firm is in all respects affirmed.

The order granting allowance of fees and expenses to the Baker, Smith law firm is affirmed in the amount of $3,320.00 for expenses, and is modified by reducing the amount of fees to the sum of $35,619.00.

IT IS FURTHER ORDERED that the stay previously imposed on the granting of fees and expenses is set aside.

A copy of this order shall be transmitted to counsel for the parties.

ENTERED this 22nd day of May, 1986.

/s/ WM. F. SANDERSON, JR.
United States Magistrate

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
Dallas Division

Civil Action No.
CA 3-85-1099-T

MINEREX ERDOEL, INC., et al.,
Appellants,

v.

BAKER, SMITH & MILLS, et al.,
Appellees.

CONSENT

Pursuant to 28 U.S.C. §636(c), the parties to the instant matter hereby consent to assignment of the instant matter to the Honorable William F. Sanderson, Jr., United States Magistrate for the United States District Court, Northern District of Texas.

Dated this 12th day of September, 1985.

BAKER, SMITH & MILLS, P.C.
1910 Pacific Avenue
1000 Pacific Place
Dallas, Texas 75201
214/969-0300

By: /s/ JERRY R. SELINGER
Jerry R. Selinger
Attorney for Appellees

/s/ C. TAYLOR ASHWORTH
C. Taylor Ashworth
8080 N. Central Expressway
Suite 400
Dallas, Texas 75206
Attorney for Appellants

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the foregoing Consent was mailed, first-class mail, postage prepaid, to C. Taylor Ashworth, 8080 N. Central Expressway, Suite 400, Dallas, Texas 75206, on this 12th day of September, 1985.

/s/ GLORIA PARKER
Gloria Parker

APPENDIX E

28 U.S.C. § 636(c)

(c) Notwithstanding any provision of law to the contrary —

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of the court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any

party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. In this circumstance, the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) Notwithstanding the provisions of paragraph (3) of this subsection, at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals. Wherever possible the local rules of the district court and the rules promulgated by the conference shall endeavor to make such appeal inexpensive. The district court may affirm, reverse, modify, or remand the magistrate's judgment.

(5) Cases in the district courts under paragraph (4) of this subsection may be reviewed by the appropriate United States court of appeals upon petition for leave to appeal by a party stating specific objections to the judgment. Nothing in this parapraph shall be construed to be a limitation on any party's right to seek review by the Supreme Court of the United States.

(6) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

(7) The magistrate shall determine, taking into account the complexity of the particular matter referred to the magistrate, whether the record in the proceeding shall be taken, pursuant to section 753 of this title, by electronic sound recording means, by a court reporter appointed or employed by the court to take a verbatim record by shorthand or mechanical means, or by an employee of the court designated by the court to take such a verbatim record. Notwithstanding the magistrate's determination, (A) the proceeding shall be taken down by a court reporter if any party so requests, (B) the proceeding shall be recorded by a means other than a court reporter if all parties so agree, and (C) no record of the proceedings shall be made if all parties so agree. Reporters referred to in this paragraph may be transferred for temporary service in any district court of the judicial circuit for reporting proceedings under this subsection, or for other reporting duties in such court.

28 U.S.C. § 158

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b) (1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(2) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.

(3) A panel established under this section shall consist of three bankruptcy judges, provided a bankruptcy judge may not hear an appeal originating within a district for which the judge is appointed or designated under section 152 of this title.

(c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders and decrees entered under subsections (a) and (b) of this section.

28 U.S.C. § 1334 (1978)

Bankruptcy Appeals

(a) The district courts for districts for which panels have not been ordered appointed under section 160 of this title shall have jurisdiction of appeals from all final judgments, orders, and decrees of bankruptcy courts.

(b) The district courts for such districts shall have jurisdiction of appeals from interlocutory orders and decrees of bankruptcy courts, but only by leave of the district court to which the appeal is taken.

(c) A district court may not refer an appeal under that section to a magistrate or to a special master.

28 U.S.C. § 1334 (1984)

Bankruptcy cases and proceedings:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c) (1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applied to an action affecting the property of the estate in bankruptcy.

FILED
JUL 25 1988
JOSEPH E. SPANIOL, JR.
CLERK

No. 87-1789

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

BAKER, SMITH & MILLS, P.C.
f/k/a BAKER, MILLER, MILLS & MURRAY, P.C.,
Petitioner,

v.

MINEREX ERDOEL, INC., KARL-HEINZ KRUEGER AND OTTO HACKOBER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

Of Counsel:
REED L. VON MAUR
LEODIS C. MATTHEWS
O'HAIRE, FIORE & VON MAUR
Kaiserstrasse 12
6000 Frankfurt/Main 1
West Germany
011-49-69-29-10-91

ROBERT T. MOWREY
WAYNA M. MARSHALL
LOCKE PURNELL RAIN HARRELL
First RepublicBank Center
3600 Tower II
Dallas, Texas 75201-3989
(214) 754-7400

JAMES K. STEWART
Counsel of Record
KEITH R. ANDERSON
DOUGLAS C. MCALLISTER
SCHWALB, DONNENFELD, BRAY & SILBERT, P.C.
Suite 300 East
1025 Thomas Jefferson Street, N.W.
Washington, D.C. 20007
(202) 965-7910
Counsel for Respondents Minerex Erdoel, Inc., Karl-Heinz Krueger and Otto Hackober

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

1787

QUESTION PRESENTED

Whether, under the circumstances of this case, the United States Court of Appeals for the Fifth Circuit correctly concluded that a United States District Court may not refer the appeal of a decision of a United States Bankruptcy Court to a United States Magistrate for a determination not subject to further review by the District Court.

LIST OF PARTIES

The parties to the proceeding below were as follows:

Minerex Erdoel, Inc.

Karl-Heinz Krueger *

Otto Hackober

Baker, Smith & Mills, P.C., formerly known as Baker, Miller, Mills & Murray, P.C.

Sina, Inc.

Sina 77-78, Ltd.

Sina 78-79, Ltd.

Sina 79-80, Ltd.

Sina 80-81, Ltd.

LIST OF AFFILIATED CORPORATIONS

Respondent Minerex Erdoel, Inc., has no parent companies, subsidiaries, or affiliates to list pursuant to Supreme Court Rule 28.1.

---

* Mr. Krueger's name is misspelled in the caption of the case on the cover and first page of Petitioner's Petition for a Writ of Certiorari. A List of Parties is included to apprise the Court of this error in the caption.

TABLE OF CONTENTS

	Page
I. JURISDICTION	1
II. STATEMENT OF THE CASE	2
III. ARGUMENT	4
A. The Petition For Certiorari Should Be Denied Because The Decision Of The Fifth Circuit Is Not In Conflict With Any Decision Of This Court Or Any Other Court of Appeals And Because The Question Presented Does Not Frequently Arise	4
B. The Case Below Was Correctly Decided	5
IV. CONCLUSION	10

TABLE OF AUTHORITIES

Cases: Page

Califano v. Yamasaki, 442 U.S. 682 (1979) 10
Crowell v. Benson, 285 U.S. 22 (1932) 10
In re Elcona Homes Corp., 810 F.2d 136 (7th Cir. 1987) 4, 6
Jean v. Nelson, 472 U.S. 846 (1985) 10
Mathews v. Weber, 423 U.S. 261 (1976) 8
Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982) 6
United States v. CIO, 335 U.S. 106 (1948) 10
Woods v. City National Bank & Trust Co., 312 U.S. 262 (1941) 2

U.S. Constitution:

Article III 6

Statutes and Public Laws:

28 U.S.C. § 158 (Supp. III 1985) 2
28 U.S.C. § 636 (1982 & Supp. III 1985) ..... *passim*
28 U.S.C. §§ 631-639 (1982 & Supp. III 1985) 6
28 U.S.C. § 1334 (Supp. III 1985) 6
Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984) ..... *passim*

Congressional Record:

130 Cong. Rec. S6080 (daily ed. May 21, 1984).. 8
130 Cong. Rec. S6089 (daily ed. May 21, 1984).. 6
130 Cong. Rec. S6107, S6111 (daily ed. May 21, 1984) 8

Other Authorities:

Marrion, *Core Proceedings and the "New" Bankruptcy Jurisdiction*, 35 De Paul L. Rev. 675 (1986) 9
Whitten, *Consent, Caseload, and Other Justifications for Non-Article III Courts and Judges: A Comment on Commodities Futures Trading Commission v. Schor*, 20 Creighton L-Rev. 11 (1986) 9

TABLE OF AUTHORITIES—Continued

Page

Note, *The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates*, 52 U.Chi. L. Rev. 1032 (1985) 9

Note, *The Constitutionality of the Federal Magistrate System After the Northern Pipeline Decision*, 29 Vill. L. Rev. 745 (1984) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1789

BAKER, SMITH & MILLS, P.C.
f/k/a BAKER, MILLER, MILLS & MURRAY, P.C.,
Petitioner,

v.

MINEREX ERDOEL, INC., KARL-HEINZ KRUEGER
AND OTTO HACKOBER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

The Respondents, Minerex Erdoel, Inc., Karl-Heinz Krueger and Otto Hackober (hereinafter "Respondents"), respectfully request that the Court deny the Petition of Baker, Smith & Mills, P.C., for a Writ of Certiorari seeking review of the opinion of the United States Court of Appeals for the Fifth Circuit reported at 838 F.2d 781.

I. JURISDICTION

Contrary to the jurisdictional statement contained in the Petition for Writ of Certiorari, jurisdiction in the United States District Court for the Northern District of Texas did not lie pursuant to 28 U.S.C. § 636 (1982 & Supp. III 1985). Jurisdiction was proper in the District Court pursuant to 28 U.S.C. § 158 (Supp. III 1985) and 28 U.S.C. § 1334 (Supp. III 1985).

II. STATEMENT OF THE CASE

This action arises out five cases pending the United States Bankruptcy Court for the Northern District of Texas (hereinafter "Bankruptcy Court").[1] During the course of those cases, the Bankruptcy Court partially granted an application for attorneys' fees and expenses filed by Petitioner Baker, Smith & Mills, P.C. (hereinafter "Baker, Mills"). Respondents appealed that decision to the United States District Court for the Northern District of Texas (hereinafter "District Court"). The District Court referred that appeal to a United States Magistrate who affirmed the District Court's decision. The court below vacated and remanded the District Court's decision on the ground that referral of the appeal of the Bankruptcy Court's Order to a United States Magistrate was improper.

In October, 1984, Baker, Mills submitted to the Bankruptcy Court its final application for fees and expenses based upon its services as counsel in cases before the Bankruptcy Court. On behalf of the estates in bankruptcy, Respondents, in reliance upon *Woods v. City National Bank & Trust Co.*, 312 U.S. 262, 268 (1941), contested the award of fees on the ground that conflicts of the interests of the five debtors represented by Baker, Mills in underlying cases barred payment of compensation to Baker, Mills. After an evidentiary hearing and argument, the Bankruptcy Court entered an order awarding Baker, Mills most of the fees requested in its application and all requested expenses.

Pursuant to 28 U.S.C. § 158 (Supp. III 1985), Respondents appealed the Bankruptcy Court's decision to the District Court. In accordance with 28 U.S.C. § 636(c)

---

[1] The five cases are *In re Sina 77/78 Ltd.*, No. 383-00530-A, *In re Sina 78/79 Ltd.*, No. 383-00531-A, *In re Sina 79/80 Ltd.*, No. 383-00532-A, *In re Sina 80/81 Ltd.*, No. 383-00533-A, and *In re Sina, Inc.*, No. 383-00535-A.

(1982), the parties consented to referral of the appeal to a United States Magistrate,[2] and the District Court entered an order effecting a referral. Pet. App. at p. A-12. In an order and opinion, the Magistrate upheld the Bankruptcy Court's decision, except as to a portion of the fee award that was disallowed because of a lack of proof. Pet. App. at p. A-13-A-23.

Respondents appealed the Magistrate's decision to the United States Court of Appeals for the Fifth Circuit. That appeal addressed the merits of the fee award to Baker, Mills.[3] While the case was pending, the court requested, and the parties submitted, supplemental briefs addressing the issue of whether 28 U.S.C. § 636(c) authorized a United States District Court to refer to a United States Magistrate an appeal from the decision of a United States Bankruptcy Court.

On March 3, 1988, the Court of Appeals held that the District Court's referral of the appeal to the Magistrate was erroneous. The Court of Appeals therefore ordered the case remanded to the District Court for its consideration of the merits of Respondent's appeal from the Bankruptcy Court's Order.

Petitioners subsequently filed a Petition for a Writ of Certiorari with this Court.

---

[2] *See* Appendix to Petition for Writ of Certiorari (hereinafter "Pet. App.") at p. A-24.

[3] Baker, Mills also filed a cross-appeal with the Fifth Circuit in which it asserted that the Magistrate's reduction of the fee award was erroneous.

III. ARGUMENT

A. The Petition For Certiorari Should Be Denied Because The Decision Of The Fifth Circuit Is Not In Conflict With Any Decision Of This Court Or Any Other Court Of Appeals And Because The Question Presented Does Not Frequently Arise

The sole question presented in the petition for certiorari is whether a United States District Court may, with the consent of the parties, refer an appeal of a decision of a United States Bankruptcy Court to a United States Magistrate for a determination not subject to further review by the District Court. The decision of the Court below is not at odds with any decision of this Court and there is no conflict among the Circuits regarding the question presented. Furthermore, the question presented seldom arises. There is, therefore, no compelling reason for the Court to grant certiorari at this time.

Other than the decision below, only one other Court of Appeals has decided in a published opinion the question here presented. In that case, the United States Court of Appeals for the Seventh Circuit held, as did the court below, that a District Court may not, even with consent of the parties, refer to a Magistrate an appeal of a Bankruptcy Judge's decision. *In re Elcona Homes Corp.*, 810 F.2d 136, 139 (7th Cir. 1987). The *Elcona* court considered the same factual situation as that occurring in the case below. The parties had, pursuant to 28 U.S.C. § 636(c)(1), stipulated to the referral of an appeal of a decision of a Bankruptcy Court to a Magistrate. The Court of Appeals for the Seventh Circuit held that such a referral was not proper under the provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (hereinafter "BAFJA") Pub. L. No. 98-353, 98 Stat. 333 (1984). The *Elcona* case is identical in its holding to the in the case below; indeed, the court below relied upon *Elcona* in deciding the issue presented below.

Furthermore, a review of the decision below would commit the resources of this Court to review an issue which, as the paucity of authority regarding the issue illustrates, seldom arises. In the four years since the effective date of the BAFJA, only two reported cases have decided the issue presented by Petitioner. In the absence of the likelihood of a substantial impact upon the administration of justice by a decision of this Court, a grant of a writ of certiorari is inappropriate in this case.

In a case such as this, the primary functions of a grant of certiorari are the harmonization or resolution of splits of authority between the various circuits or the resolution of an important question of federal law which has not been decided by this Court. Sup. Ct. Rule 17.1.[4] Those reasons for a grant of certiorari do not exist here. In light of the absence of any conflict among the Circuits on this issue and the infrequency with which the issue arises, review by this Court at this time is unwarranted.

B. The Case Below Was Correctly Decided

The decision of the Court below is in accordance with the language and purpose of the BAFJA and the Fed-

---

[4] That Rule provides in pertinent part as follows:

> A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter. . .
>
> * * * *
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

eral Magistrates Act, 28 U.S.C. §§ 631-639 (1982 & Supp. III 1985). The primary purpose of the BAFJA was to amend the Bankruptcy Code to provide for direct supervision of the Bankruptcy Courts by District Court judges appointed pursuant to Article III of the United States Constitution. The decision below was correctly decided as it furthers the important policies of the BAFJA and the Federal Magistrates Act. In addition, the decision below is not contrary to any precedent cited by Petitioner.

Although the legislative history of the BAFJA is admittedly sparse, *Eclona*, 819 F.2d at 139 n.6, what legislative history exists clearly demonstrates Congress' intent to bring the United States Bankruptcy Courts under the direct supervision of Article III District Court judges. *See* 130 Cong. Rec. S6080 (daily ed. May 21, 1984) (remarks of Senator Heflin). Indeed, Section 101(a) of the BAFJA, 98 Stat. at 333, declares that United States District Courts "shall have original and exclusive jurisdiction of all cases under title 11," and that a District Court "shall have original but not exclusive jurisdiction of all civil proceedings arising under . . . or arising in or related to cases under title 11." [5] 28 U.S.C. §§ 1334(a)-(b). Congress' concern for direct supervision of Bankruptcy Courts by Article III District Court judges was prompted by this Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982). Although *Marathon* did not deal with the question, as formulated by Petitioner, presented in this case, Congress reacted to the concerns expressed in *Marathon* by effecting an overall "strengthening of the judiciary's

---

[5] The BAFJA did not grant District Courts exclusive jurisdiction of all civil proceedings arising under or relating to Title 11 cases because Congress, in accordance with this Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), recognized that courts of the various states also would have jurisdiction of these civil cases. 130 Cong. Rec. S6089 (daily ed. May 21, 1984) (remarks of Senator Hatch).

control over bankruptcy judges, to make the latter truly adjuncts of the courts." *Elcona,* 810 F.2d at 139. This policy would be undermined if appeals lay in the first instance to another Article I officer, a United States Magistrate. *Id.* at 139-40. *See* 130 Cong. Rec. S6080 (daily ed. May 21, 1984) (remarks of Senator Heflin) (intent of the BAFJA is to "restructure[] the jurisdiction of the bankruptcy court as an adjunct of the U.S. District Court").

Petitioner ignores these important policy considerations leading to the enactment of the BAFJA in its attempt to persuade this Court to grant certiorari. But it is this policy which was the engine behind the enactment of the BAFJA and upon which the courts deciding the issue here presented have relied. *See Elcona*, 810 F.2d at 139. To rule otherwise would be to neutralize the reasons for the BAFJA's enactment. Rather than a system in which Bankruptcy Courts are under the direct supervision of Article III District Court judges, Petitioner's reading of the applicable statutes would provide a system in which review of a bankruptcy judge's decision would, in the first instance, be by another Article I officer, and review of the decision of a bankruptcy judge by Article III judges would not occur unless an appeal were taken to a Court of Appeals. Such a reading of the applicable statutes would be absolutely contrary to the congressional intent in the enactment of the BAFJA. *Elcona*, 810 F.2d at 139-40.

Additionally, Congress provided an elaborate framework for bankruptcy appeals when it enacted the BAFJA.[6] 28 U.S.C. § 158. The lack of any reference within the

---

[6] Section 104 of the Act, 98 Stat. at 341, provides that bankruptcy appeals shall be heard by "district courts" or, if the circuit in which the court sits has established a bankruptcy appellate panel, all parties consent, and the district judges for the district in which the bankruptcy court sits, by majority vote approve, a bankruptcy appellate panel composed of bankruptcy judges.

elaborate statutory framework to the power of Magistrates to hear appeals strongly supports the proposition that Congress did not intend to grant Magistrates that power. *See Elcona*, 810 F.2d at 139.

Moreover, the cases upon which Petitioner relies in arguing that the decision is wrongly decided are inapposite. A case chiefly relied upon by the Petitioner, *Mathews v. Weber*, 423 U.S. 261 (1976), relates to a United States Magistrate's jurisdiction and powers under 28 U.S.C. § 636(b), which expressly provides for the review by a District Court judge of a recommendation of a United States Magistrate. That case neither discusses nor decides any issues relating to magisterial referrals under Section 636(c), which does not provide for review of a United States Magistrate's decisions by a District Court judge before appeal to a Court of Appeals.[7] The *Mathews* court specifically referred to the supervisory powers of, and the possibility of de novo review by, a District Court judge in upholding the provisions of Section 636(b). However, these supervisory powers cannot justify the use of Magistrates under Section 636(c), where the District Court has no power of supervision or review of a Magistrate's decision.

Although Petitioner makes much of the fact that a failure to grant certiorari and reverse the decision of the court below would place an excessive strain upon

---

[7] At first glance, the legislative history of the BAFJA might suggest that the repeal of prior Section 1334 was intended to give a greater role to Magistrates to assist District Court judges in the disposition of bankruptcy cases. *See* 130 Cong. Rec. S6080 (daily ed. May 21, 1984) (remarks of Senator Thurmond). However, those remarks evidently deal with a proposed section 121 of H.R. 5174, which was not included in the bill as finally enacted. *See* Amendment 3083 to H.R. 5174, § 121, *reprinted at* 130 Cong. Rec. S6107, S6111 (daily ed. May 21, 1984) (unpassed amendment allowing magistrates to exercise "powers granted magistrates" in bankruptcy proceedings).

the fabric of the federal court system,[8] Petitioner ignores the fact that the BAFJA added 61 District Court judges to the federal bench. Pub. L. No. 98-353 § 202(e), 98 Stat. at 348. Congress, in enacting the BAFJA, recognized that, although the additional judgeships were not created specifically for the additional work created by BAFJA, these additional judges would "be very useful in handling the additional burden placed on the district courts in the bankruptcy area." 130 Cong. Rec. S6083 (daily ed. May 21, 1984) (statement of Senator Thurmond). Therefore, the section of BAFJA creating additional district court judgeships itself provides an answer to the concern expressed by Petitioners, and the consideration of judicial strain advanced by Petitioners must be rejected.

Finally, Petitioner does not raise the issues of the constitutionality under Article III of the Constitution of referrals to United States Magistrates under 28 U.S.C. § 636(c), or the constitutionality of the BAFJA amendments concerning bankruptcy judges. Both of those issues have been the subject of lively scholarly debate. *See, e.g.*, Marrion, *Core Proceedings and the "New" Bankruptcy Jurisdiction*, 35 De Paul L. Rev. 675 (1986); Whitten, *Consent, Caseload, and Other Justifications for Non-Article III Courts and Judges: A Comment on Commodities Futures Trading Commission v. Schor*, 20 Creighton L. Rev. 11 (1986); Note, *The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates*, 52 U. Chi. L. Rev. 1032 (1985); Note, *The Constitutionality of the Federal Magistrate System After the Northern Pipeline Decision*, 29 Vill. L. Rev. 745 (1984).

The determination of those issues was not, however, necessary to the decision of the court below, which relied, correctly, upon the terms of the BAFJA in holding

---

[8] Petitioner cites no empirical data or authority for its assertion, and it seems unlikely that the hearing of bankruptcy appeals has, or would, excessively strain the resources of the federal judiciary.

that the reference of the bankruptcy appeal to a Magistrate is improper. In deciding a case in which both statutory and constitutional questions are presented, this Court has consistently held that the statutory question should be considered before passing upon the constitutional question. *Califano v. Yamasaki*, 442 U.S. 682, 692 (1979); *United States v. Congress of Industrial Organizations*, 335 U.S. 106, 110 (1948). Likewise, if a construction of a statutory scheme is possible by which a serious doubt of constitutionality may be avoided, a court should adopt that construction. *Jean v. Nelson*, 472 U.S. 846, 854 (1985); *Califano*, 442 U.S. at 693; *Crowell v. Benson*, 285 U.S. 22, 62 (1932). In this case, the court below properly decided the issue presented referring solely to the statutory scheme, and any issues relating to the constitutionality of either the powers of United States Magistrates under 28 U.S.C. § 636(c) or the present scheme of bankruptcy jurisdiction should not have been decided by the court below, and need not be decided by this Court in this case.

IV. CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Of Counsel:
REED L. VON MAUR
LEODIS C. MATTHEWS
O'HAIRE, FIORE & VON MAUR
Kaiserstrasse 12
6000 Frankfurt/Main 1
West Germany
011-49-69-29-10-91

ROBERT T. MOWREY
WAYNA M. MARSHALL
LOCKE PURNELL RAIN HARRELL
First RepublicBank Center
3600 Tower II
Dallas, Texas 75201-3989
(214) 754-7400

JAMES K. STEWART
Counsel of Record
KEITH R. ANDERSON
DOUGLAS C. MCALLISTER
SCHWALB, DONNENFELD, BRAY & SILBERT, P.C.
Suite 300 East
1025 Thomas Jefferson Street, N.W.
Washington, D.C. 20007
(202) 965-7910

Counsel for Respondents Minerex Erdoel, Inc., Karl-Heinz Krueger and Otto Hackober